

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

YVONNE DALTON, et al.,

Plaintiff,

vs.

LEE PUBLICATIONS, INC., et al.,

Defendants.

CASE NO. 08cv1072 BTM (NLS)

**ORDER DENYING MOTION TO  
DISMISS OR STRIKE**

On September 9, 2008 Defendant Lee Publications filed a Motion to Dismiss or Strike Plaintiffs' First Amended Complaint [Docket No. 11]. Plaintiffs filed their response on November 2, 2008. On November 6, 2008, Defendant filed its reply. For the reasons discussed below, Defendant's Motion to Dismiss or Strike is **DENIED**.

**I. BACKGROUND**

The following facts are taken from the Complaint. The Court makes no finding as to the truthfulness of the allegations of the Complaint.

Defendant Lee Publications, Inc. operates the *North County Times*, a newspaper of general circulation in the San Diego area. (First Am. Compl. ("FAC") ¶¶ 9, 12.) Plaintiffs are current and former home delivery newspaper carriers for Defendant. (FAC ¶ 7.) Plaintiffs perform several functions at distribution centers owned and operated by Defendant. (FAC ¶ 13.) For example, Plaintiffs fold and/or insert pre-prints, supplements, inserts, samples, and other products into plastic bags, which bags the Defendant requires Plaintiffs to

1 purchase for delivery of the papers. (Id.) Defendant uses computer systems to instruct  
2 Plaintiffs on delivering newspapers. (FAC ¶ 14.) Defendant requires no special education,  
3 certification, or licensing (beyond a license to operate a car) to perform work as a home  
4 delivery carrier. (FAC ¶ 15.) Defendant classifies Plaintiffs as independent contractors, not  
5 employees. (FAC ¶ 17.)

6 On April 18, 2008, Plaintiffs filed a complaint in the Superior Court of California.  
7 Defendant removed the case to the district court on June 17, 2008 pursuant to 28 U.S.C.  
8 1441(a) [Docket No. 1]. On August 21, 2008, Plaintiffs filed their First Amended Complaint  
9 ("FAC"). Plaintiffs alleged nine causes of action, including (1) failure to pay minimum wage,  
10 hourly wages, and overtime wages, (2) failure to provide proper meal periods or  
11 compensation in lieu thereof, (3) failure to provide rest breaks or compensation in lieu  
12 thereof, (4) failure to reimburse for reasonable business expenses, (5) unlawful withholding  
13 of wages due, (6) failure to provide itemized wage statements, (7) failure to keep accurate  
14 payroll records showing hours worked daily by Plaintiffs, (8) waiting time penalties, and (9)  
15 unfair business practices. On September 2, 2008, Defendant filed the instant Motion to  
16 Dismiss or Strike.

## 17 18 **II. DISCUSSION**

19 In support of their Motion to Dismiss or Strike Plaintiff's FAC, Defendant makes three  
20 arguments. First, Defendant claims that Plaintiff's class definition should be stricken to the  
21 extent that it conflicts with applicable statutes of limitations. Second, Defendant argues that  
22 Plaintiff's overtime, meal, and rest claims should be dismissed or that the FAC should be  
23 stricken as to those claims. Third, Defendant alleges that Plaintiffs' automobile expense  
24 reimbursement claims should be dismissed for failure to state a claim upon which relief may  
25 be granted.

### 26 27 **A. Statute of Limitations**

28 Defendant first argues that the Court should strike Plaintiffs' class definition to the

1 extent that it includes some members whose claims will be barred by the applicable statutes  
 2 of limitations. Plaintiff's putative class consists of all persons presently and formerly engaged  
 3 as independent contractor *North County Times* newspaper carriers since April 14, 2004.  
 4 (FAC ¶ 1.) A one year statute of limitations period applies to Plaintiffs' claims for penalties  
 5 under California Labor Codes Sections 226, 1174, and 1197.1. (See Cal. Civ. Proc. Code  
 6 § 340(a).) A three year statute of limitations period applies to Plaintiff's claim under Section  
 7 203. (See Cal. Civ. Proc. Code § 338(a).)

8 Defendant correctly points out that any claims by class members whose contracts  
 9 ended prior to the applicable statute of limitations period may be barred. However, the issue  
 10 of the applicability of the statute of limitations is more appropriately addressed in a motion  
 11 for partial summary judgment or class certification. Whether or not there are issues of tolling  
 12 cannot be ascertained on the record before the court. The motion to dismiss or strike based  
 13 on the statute of limitations is **DENIED** without prejudice.

#### 14 15 B. Overtime, Meal, and Rest Claims

16 Defendant next argues that the Court should dismiss or strike Plaintiffs' class overtime  
 17 (First Cause of Action), meal (Second Cause of Action), and rest period (Third Cause of  
 18 Action) claims.

19 A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure  
 20 12(b)(6) should be granted only where a plaintiff's complaint lacks a "cognizable legal theory"  
 21 or sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901  
 22 F.2d 696, 699 (9th Cir. 1988). The plaintiff must set forth only a "short and plain statement"  
 23 of the claim showing that plaintiff is entitled to relief. Conley v. Gibson, 355 U.S. 41, 47  
 24 (1957). When reviewing a motion to dismiss for failure to state a claim, the Court accepts  
 25 all well-pleaded facts of the complaint as true and construes them in the light most favorable  
 26 to the nonmoving party. Decker v. Advantage Fund, Ltd., 362 F.3d 593, 595 (9th Cir. 2004).

27 Defendant makes two arguments in support of their assertion that the Court should  
 28 strike or dismiss Plaintiffs' overtime, meal, and rest claims. First, Defendant claims that

1 individual issues predominate with respect to these claims. Second, Defendant alleges that  
2 Plaintiffs' FAC fails to meet the pleading requirements of Federal Rule of Civil Procedure  
3 8(a).

4  
5 1. Commonality

6 Courts construe Rule 23(a)(2)'s commonality requirement permissively. "All questions  
7 of fact and law need not be common to satisfy the rule. The existence of shared legal issues  
8 with divergent factual predicates is sufficient, as is a common core of salient facts coupled  
9 with disparate legal remedies within the class." Hanlon v. Chrysler Corp., 150 F.3d 1011,  
10 1019 (9th Cir. 1998). Defendant relies primarily on Brinker Restaurant Corp. v. Superior  
11 Court, 80 Cal. Rptr. 3d 781 (Cal. App. 2008) to argue that Plaintiff's class lacks commonality  
12 with regard to meal and rest claims. Because the California Supreme Court recently granted  
13 review of Brinker, however, it has no precedential value. (Cal. Rules of Ct., Rules  
14 8.1105(e)(1), 8.1115(a).) Defendant also relies on two other unpublished federal district  
15 court opinions that cite to the California Court of Appeals decision in Brinker. Even  
16 disregarding their questionable precedential value, those cases address an issue different  
17 from the one here. Brinker held that while employers have a duty to *provide* meal breaks,  
18 they need not *ensure* that employees actually take them. 80 Cal. Rptr. 3d at 807. Brinker  
19 denied certification because the employer in that case actually authorized meal breaks but  
20 individual issues predominated on the question of whether the employees were otherwise  
21 prohibited from taking them.

22 Plaintiffs, however, allege that the primary issue here is whether Defendant improperly  
23 classified them as "independent contractors" rather than "employees," depriving them of the  
24 benefits and protections offered to employees by the California Labor Code. (FAC ¶¶ 22,  
25 23(c).) Further, Plaintiffs claim that, on the basis of this classification, Defendant failed to  
26 *authorize* or *provide* meal and rest periods. Courts have allowed actions to proceed where  
27 plaintiffs' meal and rest break claims focused on an employer's failure to provide, authorize,  
28 or permit breaks commonly to a class of employees. See Cicairos v. Summit Logistics, Inc.,

1 133 Cal. App. 4th 949, 962–963 (2005) (holding that employer failed to provide required meal  
2 and rest periods to class of truck drivers where it instructed drivers that they had a right to  
3 breaks, but failed to include a requisite code in the computer system tracking drivers’  
4 activities, and pressured drivers to make more than one trip per day); Cervantez v. Celestica  
5 Corp., 253 F.R.D. 562, 573 (C.D. Cal. 2008) (finding commonality where plaintiffs presented  
6 anecdotal, direct factual, and statistical evidence from which the court could infer a corporate  
7 policy of not offering an additional meal period when employees worked over ten hour shifts);  
8 Otsuka v. Polo Ralph Lauren Corp., 251 F.R.D. 439, 445 (N.D. Cal. 2008) (finding  
9 commonality prerequisite satisfied where plaintiffs claimed that “Defendant had a policy of  
10 not providing or discouraging breaks.”)

11 Although some facts may diverge among members of Plaintiffs’ class, the common  
12 legal issue regarding whether Defendant should have classified them as employees, rather  
13 than independent contractors, predominates. Again, the Court finds that the issue of  
14 commonality would be better addressed on a full record on a motion for class certification.  
15 Therefore, at this early stage of the case, the Court rejects Defendant’s argument that  
16 Plaintiffs cannot satisfy the prerequisite of commonality as to their overtime, rest, and meal  
17 period claims.

## 18 19 2. Rule 8(a)

20 Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain “a short and  
21 plain statement of the claim showing that the pleader is entitled to relief.” Courts need not  
22 accept as true allegations that are merely conclusory, unwarranted deductions of fact, or  
23 unreasonable inferences. In re Gilead Sciences Securities Litigation, 536 F.3d 1049, 1055  
24 (9th Cir. 2008). A complaint may be properly dismissed “if it fails to ‘plead enough facts to  
25 state a claim to relief that is plausible on its face.’” Id. (quoting Weber v. Dep’t of Veterans  
26 Affairs, 521 F.3d 1061, 1065 (9th Cir. 2008)). “But, so long as the plaintiff alleges facts to  
27 support a theory that is not facially implausible, the court’s skepticism is best reserved for  
28 later stages of the proceedings when the plaintiff’s case can be rejected on evidentiary

1 grounds.” Id. at 1057.

2 Defendant argues that Plaintiffs’ claims should be dismissed because their FAC fails  
3 to allege facts indicating that any named Plaintiff was actually denied overtime pay or a meal  
4 or rest break. Defendant also claims that Plaintiffs fail to allege any class-wide policy by  
5 which Defendant denied meal or rest breaks. The Court disagrees with Defendant’s  
6 assertions. Rather, Plaintiffs’ FAC claims that Defendant improperly classified Plaintiffs as  
7 independent contractors. (FAC ¶ 1.) Based on this allegedly erroneous classification,  
8 Plaintiffs assert that Defendant failed to offer any overtime pay, meal or rest breaks that  
9 California law requires employers to provide to their employees. (FAC ¶¶ 19, 27–29, 31, 32,  
10 35, 36.) The Court finds that, at this early stage of the proceedings, Plaintiff has alleged facts  
11 sufficient to support facially plausible overtime and meal and rest break claims. Therefore,  
12 the Court **DENIES** Defendant’s motion to dismiss or strike Plaintiffs’ overtime and meal and  
13 rest break causes of action.

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16 C. Expense Reimbursement Claims

17 Defendant finally argues that Plaintiffs’ expense reimbursement claim should be  
18 dismissed for failure to state a claim. Defendant contends that there is no statutory right to  
19 reimbursement for automobile expenses under Cal. Labor Code § 2802 (“Section 2802”), as  
20 Plaintiffs allege in their Fourth Cause of Action. The Court disagrees.

21 California courts have found a right to reimbursement for automobile expenses under  
22 Section 2802. For example, in Estrada v. FedEx Ground Package System, Inc., 154 Cal.  
23 App. 4th 1, 24–25 (2007) the California Court of Appeals held that an applicant or employee  
24 could be required, as a condition of employment, to furnish his or her own vehicle. The Court  
25 of Appeals stated that “it is perfectly lawful for an employer to require its employees

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1 to provide their own vehicles as a condition of employment, *provided only that the employees*  
 2 *must be reimbursed for the expenses thereby incurred.*<sup>1</sup> *Id.* In Gattuso v. Harte-Hanks  
 3 Shoppers, Inc., 42 Cal. 4th 554, 575 (2007), the California Supreme Court similarly found  
 4 that the defendant employer was obliged to reimburse its sales representative employees for  
 5 automobile expenses when it held that the employer could satisfy this burden through  
 6 enhanced compensation rather than separate reimbursement for actual expenses. The  
 7 California Supreme Court affirmed the judgments of the trial and appellate courts in Gattuso,  
 8 which had rejected the defendant's contention that it had no automobile reimbursement  
 9 obligation under Section 2802.

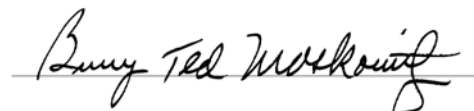
10 The Court finds that Estrada and Gattuso stand for the proposition that Section 2802  
 11 provides a statutory right to reimbursement for automobile expenses. Thus, the Court  
 12 **DENIES** Defendant's motion to dismiss Plaintiff's claims for automobile expense  
 13 reimbursement under Section 2802.

### 14 15 CONCLUSION

16 For the reasons explained above, the Court hereby **DENIES** Defendant' Motion to Dismiss  
 17 or Strike in its entirety.

18 **IT IS SO ORDERED.**

19 DATED: January 7, 2009

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21 Honorable Barry Ted Moskowitz  
 22 United States District Judge

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 25 <sup>1</sup> In stating this conclusion, the Court of Appeals cited bulletins and opinion letters  
 26 issued by the Department of Industrial and Labor Relations, Division of Labor Standards  
 27 Enforcement. Defendant argue that because the DLSE interpretations of Section 2802 do  
 28 not comport with requirements of the Administrative Procedures Act, they are void and  
 entitled to no deference. See Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557,  
 575–576 (1996). Nevertheless, even where no weight should be given to an agency  
 interpretation, courts may still consider whether the agency interpretation was correct. *Id.*  
 at 577. “[A] court may adopt a DLSE statutory interpretation embodied in a void regulation  
 if the court independently determines that the interpretation is correct.” Gattuso v. Harte-  
Hanks Shoppers, Inc., 42 Cal. 4th 554, 563 (2007).